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In the Supreme Court

OF THE

United States

OCTOBER TERM, 1971

No. 71-810

CHICKEN DELIGHT, INC., CHICKEN DELIGHT OF CALIFORNIA, INC., and CONSOLIDATED FOODS CORP., *Petitioners*,

vs.

HARVEY SIEGEL and ELAINE SIEGEL, husband and wife, DAVID WITT, ROBERT VAN SCHAICK, RALPH R. ANDRE, and RUTH L. ANDRE, husband and wife, and RICHARD ZACHARY, *Respondents*.

BRIEF OF RESPONDENTS IN OPPOSITION

MICHAEL N. KHOURIE,
ROYCE H. SCHULZ,
425 California Street,
San Francisco, California 94104,
Telephone: (415) 982-2800,
Attorneys for Respondents.

BROAD, KHOURIE & SCHULZ,
425 California Street,
San Francisco, California 94104,
Telephone: (415) 982-2800,
Of Counsel.

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BRIEF OF RESPONDENTS IN OPPOSITION

Respondents Harvey and Elaine Siegel, *et al.* respectfully pray that the Petition for a Writ of Certiorari (No. 71-810) filed December 20, 1971 by Chicken Delight, Inc., *et al.*, be denied. Respondents further pray that their own Petition for a Writ of Certiorari (No. 71-824) filed December 22, 1971 be granted.

QUESTIONS PRESENTED

Stripped of argumentative assertions the questions presented by this petition would appear to be

1. Does the licensing, by a franchisor, of unique, registered trademarks, trade name and system of operation only on condition that the franchisees buy their total requirements of certain packaging materials, food mixes and cooking machines exclusively from the franchisor constitute a tying arrangement under section 1 of the Sherman Act?

2. Does the tying item—Chicken Delight's package of unique, registered trademarks, trade name and system of operation—possess sufficient economic power, as a matter of law, to render the tying arrangement unlawful *per se* under section 1 of the Sherman Act?

3. Under what conditions may an otherwise *per se* unlawful tying arrangement be justified?

STATEMENT OF THE CASE

(a) Nature of the case

This is a class action antitrust suit in which approximately 800 current and former franchisees of Chicken Delight seek treble damages for overcharges on required purchases of packaging materials, dry food mixes and cooking machines. From the inception of its franchise system, Chicken Delight required its franchisees to purchase their full requirements of the above items exclusively from Chicken Delight as a condition of the initial grant of a trademark license and as a condition on the right of con-

tinued use of the Chicken Delight trademarks, trade name and system of operation. The District Court and the Court of Appeals for the Ninth Circuit ruled that this arrangement is a tie-in, unlawful *per se* under section 1 of the Sherman Act, and unjustified by any purported legitimate business purpose of the defendants.[1]

(b) Chicken Delight's franchise agreements and operations

Chicken Delight licenses its franchisees to prepare food for sale to the public pursuant to specifications relating to cooking methods, packaging and service. Chicken Delight itself manufactures nothing which the franchisees sell to the public; franchisees prepare all meals with which the Chicken Delight trademarks are associated. Petitioners have obscured the issues by attempting to bring themselves within the scope of authorities concerned with restrictions imposed on franchised distributors by *manufacturers* of trademarked or brand name products. They discuss, indiscriminately, the trademark license ("image" franchising) situation and the distribution of trademarked goods, without identifying which situation is under discussion.[2]

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[1] In addition, the District Court ruled that proof of direct overcharges on the tied items established the *fact* of damage as a matter of law. This ruling on damages was reversed by the Court of Appeals. The propriety of this reversal is presented for determination by this Court in the Petition for a Writ of Certiorari (No. 71-824) filed December 22, 1971 by respondents herein. It is respondents' position that this ruling on damages is the only issue which merits the consideration of this Court.

[2] *See, e.g.*, Petition at 11-16. Compare,

> "The concept of 'franchising' covers at least two different types of factual situations. The first involves the distribution of finished manufactured goods: the manufacturer (such as General Motors or Schwinn) is using its 'franchise' system to distribute its trademarked goods. The second type of 'franchise' arrangement is basically a trademark or tradename licensing program: the owner of the mark (such as Carvel)

This fact is critical: the items the franchisees were forced to buy from Chicken Delight were items, manufactured by third parties, designed to implement the sale of the trademarked products, and were not themselves the trademarked products. The franchise agreements licensed the right *to prepare and serve to the public hot, freshly prepared chicken and other cooked meals.*[3] It was cooked chicken, not cooking machines, dry batter mix, dry barbecue seasoning mix, paper plates, tubs or pizza boxes which the public associated with the name "Chicken Delight".

REASONS FOR DENYING THE WRIT

I

THE COURT OF APPEALS PROPERLY CONSTRUED AND APPLIED FORTNER[4]

To establish an unlawful tying arrangement the plaintiff must demonstrate: (1) that the arrangement involves two or more distinct products and provides that one may not be obtained unless the other is also purchased, *Times-Picayune Publishing Co. v. United States*, 345 U.S. 594,

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licenses franchisees to conduct a certain type of enterprise under a common tradename or trademark." * * *

"The two types of franchise arrangements involve somewhat different types of antitrust issues. The 'distribution' type of franchise arrangement is most directly affected by the *Schwinn*-type rules on resale. Meanwhile, the 'license' type of franchise arrangement is most affected by the tie-in rules, since such arrangement is often based on some sort of tie-in between the trademark and some products which the franchisor requires his franchisees to buy."

Baker, *Another Look at Franchise Tie-ins After Texaco and Fortner*, 14 The Antitrust Bull. 767 (1969).

[3] *See, e.g.*, Appendix C to the Petition.

[4] *Fortner Enterprises, Inc. v. United States Steel Corp.*, 394 U.S. 495 (1969).

613-614 (1953); (2) that the tying item possesses sufficient economic power to appreciably restrain competition in the tied product market, *Northern Pacific R. Co. v. United States*, 356 U.S. 1, 6 (1958); and (3) that a "not insubstantial" amount of commerce in the tied product market is affected, *International Salt Co. v. United States*, 332 U.S. 392, 395-96 (1947). Chicken Delight concedes that the third requirement has been satisfied (Petition at 19 n. 10) but denies the existence of the first two. In addition, Chicken Delight apparently contends that at least in the "franchising" context the plaintiff must also prove that the tie-in was made *"with the purpose or effect of market power extension"* (Petition at 14) and that the tying arrangement was not justified by legitimate business purposes. It is clear, however, that these latter two contentions are unfounded and that the lower courts properly determined that the first two requirements had been satisfied.

A. Two Products—the Package of Trademarks, Trade Name and System Is Distinct From the Packaging, Cooking and Seasoning Tied Items.

Under section 1 of the Sherman Act, any property, tangible or intangible, may be a tying item. Tying items have been found under the Sherman Act among such diverse non-commodities as credit,[5] motion picture exhibition rights,[6] trademark licenses,[7] photocopy equipment

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[5] *Fortner Enterprises, Inc. v. United States Steel Corp., supra.*

[6] *United States v. Loew's, Inc.*, 371 U.S. 38 (1962).

[7] *Perma Life Mufflers, Inc. v. International Parts Corp.*, 392 U.S. 134 (1968); *Susser v. Carvel Corp.*, 332 F.2d 505 [majority opinion, at 519; dissenting opinion at 513] (1964), *cert. dismissed as improvidently granted*, 381 U.S. 125 (1965); *Arthur Murray, Inc. v. Reserve Plan, Inc.*, 406 F.2d 1138 (8th Cir. 1969).

service contracts,[8] real estate leases,[9] and news wire services.[10]

Chicken Delight seeks to convey the impression that the lower courts applied a formalistic, mechanical test to determine the existence of distinct tying and tied products.[11] It then proceeds to state the "correct" principle to be "the combining of a dominant desired product with the 'forced purchase of a second commodity' *for the purpose of market extension.*" Petition at 13; emphasis in original. Leaving for later discussion the reference to the purpose of the tie-in, the principle as stated by Chicken Delight is identical to that applied by the lower courts. See Appendix A to the Petition at 5-9; Appendix B to the Petition at 3.

Both the District Court and the Court of Appeals applied a functional market analysis to the issue, examined the tying and tied products in the economic context in which the tie-in existed and then determined that two distinct products, not merely physically or conceptually separable but separated in actual market usage, existed.[12]

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[8] *Advance Business Systems & Supply Co. v. SCM Corporation*, 415 F.2d 55 (4th Cir. 1969), *cert. denied*, 397 U.S. 920 (1970).

[9] *Northern Pacific R. Co. v. United States, supra.*

[10] *Associated Press v. Taft-Ingalls Corp.*, 340 F.2d 753 (6th Cir.), *cert. denied*, 382 U.S. 820 (1965).

[11] *See, e.g.*, Petition at 12 ". . . merely in the conjunctive marketing of items which are conceptually severable."; Petition at 13 ". . . the mere coupling of physically separable objects . . ."

[12] *See, e.g.*, the statement of the Court of Appeals, Appendix A to the Petition at 6-7 n. 4:

> "In determining whether an aggregation of separable items should be regarded as one or more items for tie-in purposes in the normal cases of sales of products the courts must look to the function of the aggregation. Consideration is given to such questions as whether the amalgamation of products resulted in cost savings apart from those reductions in sales

Following the statement quoted in the footnote, the Court of Appeals analyzed the role and function of trademark licenses in the "image" franchising industry and concluded that the trademark license was functionally distinct from the myriad other products used by a franchisee to prepare, package and market the end product with which the trademark is actually associated. Appendix A to the Petition at 7-9.

Chicken Delight concedes that a trademark license can be a tying product, i.e., a functionally distinct and separate item. Petition at 14. Elsewhere it states that in fact most companies in the fast food industry do charge for their trademark licenses separately from other products which they might sell to their franchisees. Brief of Re-

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expenses and the like normally attendant upon any tie-in and whether the items are normally sold or used as a unit with fixed proportions.[4]

"[4]It should be readily apparent that, measured against these tests, the package sales here in question are quite different from the sale of an automobile and its tires or a left shoe and the right. In particular, there are several factors in this case which other courts have deemed sufficient to find a tie-in. Undisputed testimony at trial established that other franchisors in fast food businesses similar to that of Chicken Delight sold their licenses separate from the essential supplies. The various supplies sold here were sold individually and in differing amounts, rather than in a preassembled package, and the franchisees were billed accordingly. At no time were the franchises required to purchase all their various supplies from Chicken Delight. Chicken Delight did not itself manufacture the tied items. See Associated Press v. Taft-Ingalls Corp., 340 F.2d 753, 764 (6th Cir. 1965); United States v. Jerrold Electronics Corp., supra, 187 F.Supp. at 559."

and the statement of the District Court, Appendix B to the Petition at 3:

"In the economic context of present franchising trends, it is clear that a franchise license is marketable separate and apart from the various products which the franchisees are required to purchase from and through the franchisor."

spondents in Opposition to Petition (No. 71-824) at 3. And yet, it continues to assert that in compelling its franchisees to purchase their requirements of cooking equipment, dry food mixes and packaging materials as a condition of obtaining a trademark license Chicken Delight was not imposing a tie-in but rather was selling a package—a single product—the Chicken Delight "system". The apparent rationale is that since each of these discrete items was "essential" to the successful operation of a Chicken Delight franchise, in combination they constitute a single product. But, as the Court of Appeals noted

> "[t]he relevant question is not whether the items are essential to the franchise, but whether it is essential to the franchise that the items be purchased from Chicken Delight. This raises not the issue of whether there is a tie-in but rather the issue of whether the tie-in is justifiable, . . ." Appendix A to the Petition at 9.

The District Court and the Court of Appeals properly determined the Chicken Delight trademark license to be a separate and distinct tying item. This result is supported by substantial authority. *Perma Life Mufflers, Inc. v. International Parts Corp.*, 392 U.S. 134 (1968); *Susser v. Carvel Corp.*, 332 F.2d 505 [majority opinion at 519; dissenting opinion at 513] (2nd Cir. 1964), *cert. dismissed as improvidently granted*, 381 U.S. 125 (1965); *Arthur Murray Inc. v. Reserve Plan, Inc.*, 406 F.2d 1138 (8th Cir. 1969).

B. The Chicken Delight Trademark License, as a Matter of Law, Has Sufficient Economic Power to Appreciably Restrain Trade.

As a second ground justifying review by this Court, Chicken Delight asserts that both the District Court and the Court of Appeals erroneously applied this Court's decision in *Fortner Enterprises, Inc. v. United States Steel Corp., supra*, "by converting an evidentiary presumption of economic power into irrebuttable proof." Petition at 19. The most cursory reading of the opinions below demonstrates that such is not the case.

Prior decisions of this Court have made it unmistakeably clear that the existence of sufficient economic power in the tying item is presumed where the tying item is patented, *International Salt Co. v. United States, supra*; where the tying item is copyrighted, *United States v. Loew's Inc., supra*; *United States v. Paramount Pictures, Inc.*, 334 U.S. 131 (1948); and where the tying item is physically unique as in the case of land, *Northern Pacific R. Co. v. United States, supra*. In *Fortner, supra*, this Court explained the significance of uniqueness of the tying item and distinguished the allegations in that case as follows:

> "[w]e do not mean to accept petitioners' apparent argument that market power can be inferred simply because the kind of financing terms offered by a lending company are 'unique and unusual.' We do mean, however, that uniquely and unusually advantageous terms can reflect a creditor's unique economic advantages over his competitors.[2]
>
> "[2]Uniqueness confers economic power only when other competitors are in some way prevented from offering the distinctive product themselves. Such

The present case involves a unique item, a combination of registered trademarks, tradename and symbols. No other franchisor in the fast food industry can offer this item to prospective franchisees without violating the trademark laws which grant to Chicken Delight a proprietary interest therein. The Court of Appeals properly concluded that

> "[j]ust as the patent or copyright forecloses competitors from offering the distinctive product on the market, so the registered trade-mark presents a legal barrier against competition. It is not the nature of the public interest that has caused the legal barrier to be erected that is the basis for the presumption, but the fact that such a barrier does exist. Accordingly, we see no reason why the presumption that exists in the case of the patent and copyright does not equally apply to the trademark." Appendix A to the Petition at 12.

The above quote from *Fortner* thoroughly disposes of the purported conflict between the decision in this case and the recent decision of the Court of Appeals for the Sixth Circuit reversing a directed verdict for the plaintiff

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barriers may be legal, as in the case of patented and copyrighted products, e.g., International Salt; Loew's, or physical, as when the product is land, e.g., Northern Pacific. It is true that the barriers may also be economic, as when competitors are simply unable to produce the distinctive product profitably, but the uniqueness test in such situations is somewhat confusing since the real source of economic power is not the product itself but rather the seller's cost advantage in producing it." 394 U.S. at 505.

on the remand of *Fortner Enterprises, Inc. v. United States Steel Corp.* Supplemental Brief in Support of Petition (No. 71-810). The instant case involves a unique item. In *Fortner* the tying item was money—in the words of Mr. Justice White—"the most fungible item of trade since it is by definition an economic counter." *Fortner Enterprises, Inc. v. United States Steel Corp.*, dissenting opinion of Justices White and Harlan, 394 U.S. at 515. Thus, in *Fortner* any barrier to competition was economic rather than legal. Competing lending companies were precluded, if at all, solely by U.S. Steel's cost advantages in providing credit. For this reason, a directed verdict in *Fortner* would be improper, the existence of unique economic advantages in that context is clearly a question of fact. Not so when the tying item itself is unique.

Therefore, the District Court and the Court of Appeals properly held that the presumption of sufficient economic power applied to this case. While Chicken Delight concedes that such an evidentiary presumption of economic power applies to this case (Petition at 19) it contends that the lower courts transformed it into conclusive, irrebuttable proof, and argues that it is entitled to produce evidence to rebut this presumption. Petition at 23. Chicken Delight did have this opportunity. However, the only evidence offered, on which reliance is now placed, is to the effect that Chicken Delight enjoyed no monopoly as a franchisor but had to compete for franchisees with other firms which offered trademark licensing programs based upon their own unique and desirable trademarks. Petition at 22. Those facts, if taken as true, do not detract from the finding that *Chicken Delight* had sufficient economic power (albeit per-

haps not the only franchisor so situated) to appreciably restrain competition in the tied products. *United States v. Loew's, Inc., supra* at 49.

This Court has made it abundantly clear that the party imposing a tie-in need not have monopoly nor even dominant market power to produce a tying arrangement which *per se* violates the antitrust laws. In *Fortner Enterprises, Inc. v. United States Steel Corp., supra,* this point was underscored as follows:

> "[t]he standard of 'sufficient economic power' does not, as the District Court held, require that the defendant have a monopoly or even a dominant position throughout the market for the tying product. Our tie-in cases have made unmistakeably clear that the *economic power over the tying product can be sufficient even though the power falls far short of dominance and even though the power exists only with respect to some of the buyers in the market.* See, e.g., International Salt; Northern Pacific; United States v. Loew's Inc. As we said in the Loew's case, 317 U.S. at 45: 'Even absent a showing of market dominance, the crucial economic power may be inferred from the tying product's desirability to consumers or from uniqueness in its attributes.'
>
> "These decisions rejecting the need for proof of truly dominant power over the tying product have all been based on a recognition that because tying arrangements generally serve no legitimate business purpose that cannot be achieved in some less restrictive way, *the presence of any appreciable restraint on competition provides a sufficient reason for invalidating the tie. Such appreciable restraint results whenever the seller can exert some power over some of the buyers in the market, even if his power is not*

> *complete over them and over all other buyers in the market.* * * * Accordingly, the proper focus of concern is whether the seller has the power to raise prices, or impose other burdensome terms such as a tie-in, with respect to any appreciable number of buyers within the market."
>
> 394 U.S. at 502-503; emphasis added.

This holding also disposes of the purported conflict between the present case and the decision of the Court of Appeals for the Second Circuit in *Susser v. Carvel Corp., supra.* The *Susser* court held that Carvel did not have sufficient economic power because it did not command a dominant position in the market for the tying item. 332 F. 2d at 518-521. Undoubtedly, if *Susser* were tried today the Second Circuit would reach the opposite result.

C. Plaintiffs Need Not Show That the Tie-In Restrains Trade But This Fact is Demonstrated by the Record in This Case.

Chicken Delight repeatedly argues that the prohibition against tying arrangements should not be applied to its practices because, it is claimed, plaintiffs have not established the practice to be anticompetitive in purpose or effect. Petition at 14. This argument finds no support in the cases and is contrary to the facts as well.

An arrangement is *per se* unlawful under the Sherman Act if it is a tie-in, if the tying item has sufficient economic power and if a not insubstantial dollar volume of commerce in the tied items is affected. Where, as here, a plaintiff has established those three elements (which are objective tests, neither irrational nor blindly invoked, as Chicken Delight asserts) and damages arising from the arrangement, his burden is satisfied.

Chicken Delight's position that its tying arrangement cannot be found unlawful absent evidence of substantial market foreclosure in the tied product markets is fallacious. In *Fortner,* this Court reiterated the oft-stated rule that when the prerequisites of tying arrangements are found to exist those arrangements "are illegal in and of themselves, and no specific showing of unreasonable competitive effect is required." *Fortner Enterprises, Inc. v. United States Steel Corp., supra* at 498. Market foreclosure figures are irrelevant, except to show that the volume of commerce foreclosed is not *de minimis.* As this Court stated in *International Salt Co. v. United States, supra*

> "[u]nder the law, agreements are forbidden which 'tend to create a monopoly,' and it is immaterial that the tendency is a creeping one rather than one that proceeds at a full gallop; nor does the law await arrival at the goal before condemning the direction of the movement." 332 U.S. at 396.

Tying arrangements "because of their pernicious effect on competition and lack of any redeeming virtue are conclusively presumed to be unreasonable and therefore illegal without elaborate inquiry as to the precise harm they have caused or the business excuse for their use . . ." *Northern Pacific R. Co. v. United States, supra,* 356 U.S. at 5. "Where such conditions [tie-ins] are successfully exacted competition on the merits with respect to the tied product is inevitably curbed." *Id.,* at 6. The economic evils inherent in tying arrangements which the law condemns are the denial of free access by competing sellers to the tied product market and the denial of free choice between competing products on the part of buyers af-

fected by the tie-in. *Fortner Enterprises, Inc. v. United States Steel Corp., supra,* at 498-499; *United States v. Loew's, Inc., supra,* at 45. Both of these consequences are undeniably present in the Chicken Delight system. No fewer than 1,000 business enterprises were denied the freedom to trade with suppliers of the tied items who competed in the open market and whose prices and terms of sale were molded by the forces of competition. Sellers of the tied commodities, on the other hand, were denied access to the captive market, measured in millions of dollars annually, which Chicken Delight had carved out for itself with its contractual tie-ins.

Chicken Delight argues that this situation was not anti-competitive, however, because sale of the tied commodities was "incidental" to its operation as franchisor of the Chicken Delight system (Petition at 15) and because there is no evidence of market power extension because it "offered the required items for sale only to its franchisees, and only as an incident to their respective operations as authorized Chicken Delight franchise outlets." Petition at 7. But how can it be true that the sale of the tied items was only incidental to the operation of the Chicken Delight "system" when the revenues from these sales constituted the "sole source of trademark revenue"? Brief in Opposition to Petition (No. 71-824) at 2.

The greatest evil of tying arrangements is that they preclude competition on the merits between products in the tied product markets. The tier-in is able to exact a greater return for its product than free competition on the merits would permit. This is exactly what occurred under the Chicken Delight system. The fact that Chicken

Delight sold the tied products only to its franchisees, far from exonerating it from liability should confirm that it was indeed using the leverage produced by its trademark licenses to create a captive market for the tied products. Chicken Delight could not sell the tied items to independent purchasers at the prices it could exact by the terms of its standard franchise contract. *Fortner Enterprises, Inc. v. United States Steel Corp., supra,* at 504. An extraneous factor has been injected into the tied product markets and the interaction of competitive forces has been frustrated.

D. Chicken Delight's Tying Arrangements Are Totally Unjustified.

If Chicken Delight's arguments regarding the issue of justification had any relevance to this case it was only with respect to the dry food mixes and the cooking equipment. With respect to the packaging materials it is undisputed that the only specifications required were printing and color. Chicken Delight has admitted that any competent manufacturer of like products could consistently and satisfactorily manufacture the packaging products if Chicken Delight furnished the specifications. Appendix B to the Petition at 9. As the District Court noted the only showing made by Chicken Delight to justify the tie of packaging materials was a recitation of the need for distinctive packaging to be used uniformly by all franchisees in identifying the food products associated with the trademark. *Id.* The relevant question, however, is not whether distinctive packaging was necessary but whether it was necessary that it be purchased from Chicken Delight. Because Chicken Delight produced no evidence to demon-

strate *this* proposition the tie-in of paper packaging materials is unjustified as a matter of law.

With respect to the tie-in of dry food mixes and the cooking equipment both sides introduced evidence on the necessity of the tie-in for the purposes of quality control and protection of the good will of the franchise system. The District Court ruled that a question of fact existed and submitted it to the jury under instructions based upon this Court's decision in *Standard Oil Co. of California v. United States*, 337 U.S. 293 (1949):

> "Tying agreements serve hardly any purpose beyond the suppression of competition. The justification most often advanced in their defense—the protection of the goodwill of the manufacturer of the tying device—fails in the usual situation because specification of the type and quality of the product to be used in connection with the tying device is protection enough. If the manufacturer's brand of the tied product is in fact superior to that of competitors, the buyer will presumably choose it anyway. *The only situation, indeed, in which the protection of goodwill may necessitate the use of tying clauses is where specifications for a substitute would be so detailed that they could not practicably be supplied.* In the usual case only the prospect of reducing competition would persuade a seller to adopt such a contract and only his control of the supply of the tying device, whether conferred by patent monopoly or otherwise obtained, could induce a buyer to enter one. See Miller, Unfair Competition 199 et seq. (1941); Note, 49 Col L Rev 241, 246 (1949). The existence of market control of the tying device, therefore, affords a strong foundation for the presumption that it has been or probably will be used to limit competition in the tied product also." 337 U.S. at 305-306; emphasis added.

The jury found that Chicken Delight had failed to justify the tie-ins.

This test of justification, limited to situations where specifications for a substitute for the tied product would be impractical, serves both the needs of commerce and the overriding policy of competition. Where a less anti-competitive means of accomplishing the seller's purpose is available the seller is required to utilize it. *Fortner Enterprises, Inc. v. United States Steel Corp., supra,* at 503. Chicken Delight places heavy reliance on the decision of the Second Circuit in *Susser v. Carvel Corp., supra,* on the issue of justification. Petition at 27-29. It is clear, however, that the *Susser* court applied the same standard of impracticability of specification and concluded that under the facts of that case specification to each of the more than 400 franchisees *was* impractical. Two facts should be noted. First, the jury in the instant case found that as a matter of fact specification was not impractical. Second, plaintiffs have never taken the position that Chicken Delight had to specify the product standards to each of the franchisees and permit them to choose the suppliers. Plaintiffs' thesis is and was that Chicken Delight, not being the manufacturer of any of the tied items, could not set itself up as the *sole distributor* of the specified products. Plaintiffs have never taken issue with Chicken Delight's right to designate reliable manufacturers of food mixes or cooking equipment. The injury to plaintiffs arises not at the manufacturing but at the distribution level where Chicken Delight has maintained a contractual monopoly.

II

SPECIAL ANTITRUST RULES ARE NEITHER REQUIRED BY NOR JUSTIFIED IN THE FRANCHISING INDUSTRY

This petition is nothing more nor less than a plea that this Court reject the *per se* doctrine of illegality as applied to tying arrangements, at least when they occur in the trademark franchising industry. The petition is littered with statements which seek to imply that the tying of necessary commodities to a trademark license is, for some inexplicable reason, less anticompetitive than the tying of common salt to a patented machine, preferential routing to strategically located land, or block booking of desirable and undesired copyrighted motion pictures.

Franchising has been heralded as a means of preserving the role of the small entrepreneur, a class of independent merchants capable of competing in an increasingly concentrated economy. *United States v. Arnold, Schwinn & Co.*, 388 U.S. 365, 386-387 (1967) (Justices Stewart and Harlan, concurring in part and dissenting in part); *Susser v. Carvel Corp.*, 206 F.Supp. 636, 640 (S.D.N.Y. 1962). If Chicken Delight were to have its way, this independence would be mere sham. Franchisees would be even less than employees of the franchisor because they would have to invest their private capital for the privilege of being dictated to.

There is another reason that this plea should be rejected. The Sherman Act is a law of general application, designed to reach all anticompetitive activities to the fullest extent permissible within constitutional limits. *Apex Hosiery Co. v. Leader*, 310 U.S. 469 (1940); *United States v. Frankfort Distillers, Inc.*, 324 U.S. 293 (1945).

For the last thirty years, this Court has contributed to a process which has reinforced and extended the prohibition against tying arrangements because, whenever such conditions "are successfully exacted competition on the merits with respect to the tied product is inevitably curbed." *Northern Pacific R. Co. v. United States, supra,* at 6. It is far too late in the day for defendants who have used such devices to restrain trade to argue before this Court that the direction of this line of decisions is wrong. Such appeals are appropriately addressed to the Congress not to this Court.

CONCLUSION

The decision of the Court of Appeals properly applied established antitrust principles to the facts of this case and properly determined that the contractual practices of the defendants violated the Sherman Act as a matter of law. There is no basis for this Court to review that decision.

Accordingly, for the reasons set forth above, respondents herein respectfully request that the defendants' Petition for a Writ of Certiorari be denied and further request that the Petition for a Writ of Certiorari filed by respondents herein be granted.

Dated, San Francisco, California,
February 1, 1972.

Respectfully submitted,

MICHAEL N. KHOURIE,
ROYCE H. SCHULZ,
Attorneys for Respondents.

BROAD, KHOURIE & SCHULZ,
Of Counsel.